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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVE ESTEVES,

Defendant and Appellant.

B205701

(Los Angeles County
Super. Ct. No. NA074186)

APPEAL from a judgment of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Steve Esteves, appeals his second degree robbery conviction. (Pen. Code,¹ § 211.) Defendant argues the trial court improperly instructed the jury on admissions and failed to instruct on theft as a lesser included offense. We affirm.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 2 a.m. on April 27, 2007, Brian Harrison was working at the 7-Eleven market on Atlantic Boulevard. The store policy prohibited the sale of alcohol after 12 a.m. The coolers are locked from 12 a.m. to 6 a.m. Mr. Harrison was inside the cooler, stocking it. Mr. Harrison heard someone trying to open the locked door from outside the cooler. Mr. Harrison said, “Hey, we can’t sell alcohol no later than 12:00.” Mr. Harrison came out of the cooler and saw defendant holding a case of Corona beer. Mr. Harrison said he could not sell alcohol. Defendant said, “Well, then I’m taking it.” Defendant, who appeared drunk, had an aggressive look and attitude. Defendant attempted to walk toward the door of the market. Mr. Harrison then approached defendant from behind. Mr. Harrison took the beer out of defendant’s hand. Mr. Harrison then returned the beer to the cooler.

Defendant bent over into the cooler and grabbed a 12-pack of beer. Mr. Harrison knocked the beer out of defendant’s hand. Defendant struck Mr. Harrison in the chin. Defendant said, “I’m going to kick your ass.” Mr. Harrison looked toward the front door. Mr. Harrison saw two men getting out of the car to join defendant. Mr. Harrison backed off and allowed defendant to leave with the beer. Thereafter, defendant left the store with the beer, got into the back seat of the waiting car with the other two men, and then drove away. Mr. Harrison telephoned the police. A security videotape taken at the time of the incident was played at trial. Mr. Harrison explained what was occurring while the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

videotape was played for the jurors. Mr. Harrison memorized the license plate of the car in which defendant left. Defendant and his companions were yelling at Mr. Harrison as they departed. When the police arrived, Mr. Harrison told them what had occurred. Defendant never attempted to pay for the bottle of beer. During questioning by the prosecutor, the following occurred: “Q If defendant hadn’t swung at you and punched you, would you let defendant take the bottle of beer? [¶] A No I would not have.” Mr. Harrison did not hit defendant.

Adarryl Thomas had stopped at the 7-Eleven market on April 27, 2007, at approximately 2 a.m. to buy tobacco. When Mr. Thomas first entered the store, he did not see anyone present. However, shortly thereafter, Mr. Thomas saw Mr. Harrison come from the back of the store. Mr. Thomas saw Mr. Harrison struggling with defendant, who was attempting to purchase beer after hours. Mr. Harrison was attempting to pull a case of beer from defendant’s grip. Once defendant was told that he could not buy the beer, he said, “Fuck this, I’m going to take the beer anyway.” The case of beer broke. Defendant then grabbed another smaller case of beer. Mr. Harrison attempted to take the second case of beer. Defendant then hit Mr. Harrison in the head. Mr. Harrison released defendant. Defendant went outside with the beer to a black automobile, where three other individuals were waiting. Mr. Thomas testified what happened next, “He challenged [Mr. Harrison] to come outside so he could kick his ass.” Defendant’s three companions got out of the car. Eventually, they convinced defendant to get inside the car. After the black car drove away, Mr. Thomas made his purchase. Mr. Thomas then followed the black car to a high-rise complex on Ocean Boulevard. Mr. Thomas then called the police. Mr. Thomas gave the police the license number of the black car. The videotape recording of the incident was played during Mr. Thomas’s testimony. Mr. Thomas testified that the videotape depicted exactly what had occurred.

Long Beach Police Officer Jeffery Deneen arrived at the Ocean Boulevard condominium complex on April 27, 2007. A security officer allowed Officer Deneen into the parking structure. Officer Deneen located a black Mercedes automobile based

upon its description and license number. The security guard provided the apartment number for the parking space. Officer Deneen and other officers went to the apartment. A Latino woman responded to the officers' knock. The woman gave the officers permission to enter the apartment. Just before the officers entered the residence, Officer Deneen heard several doors opening and closing and the sound of feet running toward the back of the apartment. Officer Deneen also heard a man say, "[T]he police are here . . . be quiet . . . hide." At least 6 and no more than 12 adults were found in a bedroom to the left of the entrance. Another four or five individuals were located in the bathroom. Officer Deneen arrested defendant. While en route to the police station, defendant spontaneously said he was not involved in any criminal activity that night. Defendant also said that the clerk, Mr. Harrison, was an Arab terrorist. Defendant said the "clerk" would not come to court to testify. Defendant was able to walk under his own power and respond to questions at the time of his arrest. Defendant provided information regarding his address and other matters without difficulty.

Officer Christopher Roth arrived at the 7-Eleven store following the incident. Mr. Harrison was visibly upset, agitated, and out of breath. Officer Roth drove Mr. Harrison to the Ocean Boulevard building for a field showup. Mr. Harrison identified defendant as the robber.

First, defendant argues that the trial court improperly failed to sua sponte instruct the jury that his admission that he intended to steal the beer should be viewed with caution. The California Supreme Court has held: "'When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution. [Citation.]' [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1134, quoting *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; see also *People v. Wilson* (2008) 43 Cal.4th 1, 19; *People v. Dickey* (2005) 35 Cal.4th 884, 905.) CALCRIM No. 358 states: "You have heard evidence that the defendant made an oral statement before the trial. You must decide whether or not the defendant made any such statement, in whole or in

part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such a statement. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Any error in failing to give the instruction was harmless. Our Supreme Court has held: "A defendant's simple denials about making the statements, along with uncontradicted testimony about his statements, may support the conclusion that the instructional error was harmless." (*People v. Wilson, supra*, 43 Cal.4th at p. 19; *People v. Dickey, supra*, 35 Cal.4th at p. 906.) As noted, both witnesses testified that defendant made the statement that he intended to take the beer. The videotape further supported their testimony. Moreover, the videotape demonstrated that defendant left the store with the beer without paying for it after assaulting Mr. Harrison. The witnesses were cross-examined regarding their testimony. In addition, the trial court instructed the jurors regarding: witness credibility (CALCRIM No. 226); single witness testimony (CALCRIM No. 301); evaluating conflicting evidence (CALCRIM 302); and prior statements as evidence. (CALCRIM No. 318.²) The instructions adequately alerted the jury to view the testimony with caution. (*People v. Wilson, supra*, 43 Cal.4th at p. 20; *People v. Dickey, supra*, 35 Cal.4th at p. 906.) It is not reasonably probable that the jury would have reached a more favorable conclusion had the instruction been given. (*People v. Mungia, supra*, 44 Cal.4th at p. 1134; *People v. Wilson, supra*, 43 Cal.4th at p. 20; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

² The jury was instructed with CALCRIM No. 318: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways. [¶] 1. To evaluate whether the witness's testimony in court is believable, and [¶] 2. As evidence that the evidence in those earlier statements is true."

Second, defendant argues the trial court had a sua sponte duty to instruct the jury on the lesser included offense of petty theft. Defendant argues: “The evidence here left doubt as to whether [defendant] had used force and fear to take the beer, as opposed to the stumbling, herky-jerky movement of an extremely intoxicated man confronted by an aggressive store clerk.” A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Ledesma* (2006) 39 Cal.4th 641, 715; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847; *People v. Melton* (1988) 44 Cal.3d 713, 746; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1232; *People v. Flannel, supra*, 25 Cal.3d at p. 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) The California Supreme Court reiterated: “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is “‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’” that the lesser offense, but not the greater, was committed.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162, quoting *People v. Flannel, supra*, 25 Cal.3d at pp. 684-685, fn. 12, original italics, and *People v. Carr* (1972) 8 Cal.3d 287, 294; see also *People v. Birks* (1998) 19 Cal.4th 108, 118.)

Penal Code section 211 defines robbery as, “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” The evidence established all of the elements of robbery in this case, including force. In addition, the evidence definitely demonstrated an element of fear. As set forth above, defendant hit Mr. Harrison in the face, grabbed the beer, and left the store without paying for the merchandise. Mr. Harrison would not have allowed defendant to take the beer but for the

punching incident. Mr. Harrison was fearful based on defendant's assault. Further, Mr. Harrison was afraid because defendant's companions appeared ready to join in a fight outside the convenience store. The fact that defendant testified that he was drunk and did not know what he was doing, was addressed by CALCRIM No. 3426 on voluntary intoxication instruction.³

Finally, any error in failing to give the lesser included instruction was harmless. (*People v. Lee* (1999) 20 Cal.4th 47, 62; *People v. Breverman*, *supra*, 19 Cal.4th at p. 178; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As set forth above, there was uncontroverted evidence that all of the elements of robbery were present: defendant forcefully took the beer from Mr. Harrison; defendant hitting Mr. Harrison in the face; the punch plus other factors caused Mr. Harrison to be fearful; and defendant left the store without paying for the bottle of beer. It is not reasonably probable that a different verdict would have resulted had the instruction been given.

³ CALCRIM No. 3426 was given as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent to permanently deprive the owner of his or her property. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance, knowing that it could product an intoxicating effect, or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication of any other purpose."

The judgment is affirmed.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.